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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JAN 12 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a computer programmer and software engineer. At the time he filed the petition, the petitioner worked at the [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and numerous supporting exhibits, including witness letters.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or corresponding sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly

applied for the national interest waiver. The director, however, did not raise this issue. The AAO will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on July 27, 2007. In an introductory statement, counsel stated:

> As a [redacted] [the petitioner] served as software engineer to help design and [redacted], an interactive computer program that helps build the science and reading skills of high school students. He continued his work on the iSTART project among other highly technical research projects . . . [redacted] from August 2002 until today.
>
> As a key player in the [redacted] [the petitioner] has distinguished himself as a highly valuable asset to the research group's success. Given the computer-based nature of the Institute's projects, [the petitioner] provides immense insight into the projects' technical aspects through his specialized expertise. He is also highly valued for his ability to combine iSTART's technical and educational facets. . . .
>
> If [the petitioner] were taken away from the iSTART project, the [redacted] would lose a repository for an enormous amount of institutional knowledge on both the software and experimental sides of the project. His mind is where an enormous portion of the Institute's success resides. . . .
>
> To require the [redacted] to conduct a labor certification would cause an undue hardship upon the institution. It would be very unfortunate if the [redacted] had to divert its focus from advancing literacy to going through the labor certification process by seeking someone with minimal qualifications for the research as opposed to someone who is one of the most talented individuals in his field.
>
> It would be contrary to the national interest to potentially deprive the [redacted] the services of [the petitioner] by making the position available to a minimally qualified U.S. worker.

From the above comments, it is clear that the petitioner's work at the [redacted] (with iSTART as his "primary project") was a central element of the initial waiver claim. The relevance of this observation will become clear in the upcoming discussion of the appeal.

The petitioner's *curriculum vitae* listed four "Federal Research Projects," only one of which, iSTART, was still ongoing at the time the petitioner compiled the document. Under "Specific Contribution to Projects," the petitioner wrote:

- Designed and contributed to the development of a software that assess [*sic*] student aptitudes with multiple-choice questions

- Designed and developed a program to assess students [*sic*] ability to self-explain texts
- Contributed to the design of a program to deliver comprehension tests in open-ended answer formats
- Designed and created a program to collect response times in reading and answering true/false questions
- Developed, designed and implemented multiple modules that use animated agents to deliver interactive reading strategy training, such as paraphrasing and preparing to read
- Created customized data structures and an authoring tool that can used [*sic*] to create training modules (using agents)
- Contributed to a [*sic*] interface module that allows teachers to deliver automated reading strategy training in the classroom

The petitioner submitted documentation of his published and presented work. This evidence establishes the petitioner's activity in his field, but does not self-evidently establish the importance or influence of the petitioner's work.

To discuss the importance of his contributions, the petitioner submitted ten witness letters. Generally, the witnesses worked with the petitioner at [redacted] where the petitioner earned his master's degree, or [redacted] stated:

> I have known and worked closely with [the petitioner] for the last seven years. Indeed, he has been instrumental in the success of my work and he possesses unique skills and knowledge that are critical to the continued success of the work that we conduct at the [redacted].
>
> I am an [redacted] and [*sic*] the [redacted] I have been at the [redacted] for 5 years, before which I was a faculty member at [redacted] for 7 years.
>
> . . . While there are many people to whom I can attribute my success, there is one person without whom many of my successes would not have been possible. Of course, that person is [the petitioner]. . . .
>
> [The petitioner] lent a helping hand in many of our projects but his primary role is in the iSTART (Interactive Strategy Training for Active Reading and Thinking) project. . . . He began working on the project at [redacted], where we first received the funding, and he fortunately agreed to come with me to the [redacted] when I joined their faculty in 2002.
>
> The primary goal of iSTART is to help high school students learn to use reading comprehension strategies that support deeper understanding. To view a video that

> demonstrates the iSTART interface, please go to iSTARTreading.com.[1] . . . Numerous studies have evaluated the impact of iSTART on both reading strategies and science comprehension for thousands of high school and college students. The results have revealed that strategies and comprehension are facilitated by iSTART, with effect sizes that have varied between 0.50 and 2.00 for strategy use and for science comprehension. . . .
>
> iSTART addresses . . . reading comprehension and science learning, and for a population afforded little attention in educational intervention research – high school students. Thus, the development and testing of interventions . . . such as iSTART is in our national interest. . . .
>
> Why is [the petitioner] crucial to this project? [The petitioner's] roles in the iSTART project cover all aspects of development and testing. First, he has created numerous modules in iSTART and he designed the iSTART interface. Second, he develops the majority of the programs for all of the experiments that we conduct. Third, he tests all of the programs that we use during testing. Fourth, he anticipates our needs for conducting experiments and guides preparation to conduct experiments. Fifth, he sets up all of the experiments that we conduct. Sixth, he interfaces with the teachers and principals in schools to set up experiments in classrooms. Seventh, he sets up computers and networks in school classrooms so that we can conduct experiments in the classrooms and takes care of all problems that we encounter.
>
> . . . Over the past 7 years, [the petitioner] has acquired a knowledge and skill base that simply does not exist elsewhere. That is because he has taken on roles that most computer programmers would not accept. In that, he is well beyond a computer programmer and critical to the survival of our projects in high school classrooms.
>
> . . . [The petitioner] fills a valuable, critical role in an important project that addresses national interests. Losing him would cripple the iSTART project. Thus, retaining [the petitioner] in the United States on a permanent basis is in the national interest of the United States.

[redacted] did not identify or provide copies of the "[n]umerous studies" relating to iSTART. From her letter, it is clear that she considered the petitioner's continued involvement in iSTART to be the central focus of the national interest waiver application.

[redacted], was one of the co-principal investigators at the beginning of the iSTART project. [redacted]

[1] The AAO attempted, without success, to visit this web site on December 22, 2011. The site does not appear to exist.

> [The petitioner] has been, and continues to be, of exceptional value to this project for three main reasons: his contributions to the software development . . . ; his superlative skills in the preparation for, setting up, and management of long term experiments in high school settings; and his active role as a repository of institutional knowledge about the whole project. . . .
>
> Were [the petitioner] not be [*sic*] available to the iSTART projects, the loss would be extreme. . . . [T]he loss of [the petitioner] to the project would obliterate a communication channel that has served us well for years.

[redacted], now an associate research scientist at [redacted] previously worked with the petitioner at [redacted]. [redacted] stated that the petitioner "has played a significant role in the developmental stages of iSTART, its implementation and evaluation of the system . . . [The petitioner's] keen sense of observation, attention to detail, and robust problem-solving skills have made him a valuable asset to the project.

[redacted], now an assistant professor at [redacted] worked with the petitioner on iSTART while a doctoral student at [redacted] stated: "I cannot imagine the iSTART project without [the petitioner]," and asserted: "His involvement in this project is indispensable."

[redacted] now a research associate at Lancaster University, England, was formerly a postdoctoral research fellow at [redacted] She stated: "During my time at the University of Memphis (between April 2003 and December 2005) I worked extensively with [the petitioner]. Most of our collaborations focused on the design and assessment of . . . iSTART." [redacted] asserted that the petitioner "played a pioneering role in developing and testing iSTART as well as organizing and running the experiments to test the efficacy of the software. . . . Losing him would cause a serious drawback to the future and progression of our reading comprehension research."

[redacted] stated:

> [The petitioner] has designed and implemented various software programs that have been used to conduct research for federal research grants such as iSTART, Coh-Metrix and DataLink. He has been one of the primary programmers for the interactive Strategies for Active Reading and Thinking (iSTART) project. . . .
>
> [The petitioner] has been and continues to be a great asset to the iSTART project and the[redacted]

[redacted] associate professor and associate director of [redacted] stated that the petitioner "is the principle [*sic*] developer of interactive Strategies for Active Reading and Thinking (iSTART)" [redacted] asserted that the petitioner's "collaborations have

involved multiple institutions, including MIT, USC, Vanderbilt, and University of Chicago, amongst others. [The petitioner's] work is widely known at these prestigious institutions."

The record contains nothing from collaborators at any of the above-named institutions, but there are two letters from researchers at Northern Illinois University (NIU). [redacted] associate professor at NIU, stated:

> I met [the petitioner] in the Fall of 2005 at a meeting when our research group began collaboration with the [redacted]. We had received a grant from the Illinois Department of Education to create a tutor to help students learn to reason about science. [The petitioner] was extremely valuable in helping the project succeed. We have since received a U.S. department of Education grant to continue that work and we expect [the petitioner] to be as helpful on that project. . . .
>
> We believe that computer technologies and cognitive science have a critical role in helping students obtain skills that they missed for whatever reason. To that end, we need programmers such as [the petitioner] who are interested in improving student learning and knowledgeable about cognition. This combination of skills, knowledge, and interest is not easy to find. [The petitioner] has been a lead programmer in the iSTART project (see [redacted] [*sic*] letter for a description).
>
> Our project, the Critical Thinking tutor, used AutoTutor as an intelligent tutoring system for our development. [The petitioner] helped our group at Northern to learn the details of AutoTutor and was vital in helping us create practice and training problems using this system. He helped us understand the structure of the components and how we needed to present the information. He helped with trouble shooting errors and directed us to simple solutions.

[redacted] "worked with [the petitioner] on a number of research endeavors which require extensive computer programming, effort and talent," including "the primary program, called iSTART. . . . [The petitioner] is the primary programmer in iSTART."

[redacted] stated:

> I met [the petitioner] in the Summer of 2005 at a meeting at the [redacted] where I presented a paper to a group of leading experts on cognition and reading comprehension. At that time I observed [the petitioner's] skills not only as someone who can write programs and manage complex computer systems but his ability to transfer those skills to successfully solve complex human cognition problems. Since that initial meeting I have kept in touch with him and consulted him on many technology and design issues that I face in a project to build an intelligent tutoring system for the structure strategy.

[redacted] estimated that the petitioner "is probably one of maybe 20 people across the country" with his particular skill set. [redacted] was the only witness who did not mention iSTART.

On June 22, 2009, the director denied the petition, stating that the petitioner had not submitted any independent confirmation of the claim that he is "a 'key player' in the iSTART research," or "shown that the iSTART project has had a significant impact [in the petitioner's] field." The director also found, more generally, that the petitioner had not "demonstrated that [his] work has had an impact in the field."

On appeal, counsel states:

> The Service focuses much of its denial on the iSTART program and [the petitioner's] involvement in that program and bases part of its decision on the fact that [the petitioner] did not show that "the iSTART project has had a significant impact on [the] field." . . . [T]he impact of iSTART on the field is largely irrelevant to whether [the petitioner's] work is important enough to qualify him for a national interest waiver.

When the petitioner first filed the petition, counsel and nearly all of the petitioner's witnesses focused heavily on the iSTART project, stating directly that a waiver would serve the national interest because the iSTART project could ill afford to lose the petitioner's expertise. Counsel's entirely new claim that "the impact of iSTART on the field is largely irrelevant" appears to result from another development in the proceeding. Counsel states:

> Although [the petitioner] changed employers while his petition was pending, he is still working in the same subject area – now developing software in the research department for [redacted] and other educational tests that are used throughout the US and the world.

Counsel attempts to portray the petitioner's change of employment as a trivial detail because "he is still working in the same subject area." This line of argument, however, is utterly at odds with counsel's earlier assertion that "[i]t would be contrary to the national interest to potentially deprive the [redacted] the services of [the petitioner] by making the position available to a minimally qualified U.S. worker." Counsel originally stated that "the [redacted] would lose a repository for an enormous amount of institutional knowledge," and that "[t]o require the [redacted] to conduct a labor certification would cause an undue hardship upon the institution." The witnesses were virtually unanimous in asserting that the petitioner needed the waiver not simply to keep working in his field, but to keep working on iSTART.

Having, at first, tied the waiver request very specifically and narrowly to [redacted] need to retain the petitioner's "institutional knowledge" with respect to the iSTART project, a project that dominated

the petitioner's initial submission, it is no small matter that the petitioner has now left [redacted] and taken his "institutional knowledge" with him.

The petitioner's move to [redacted] is significant for another reason. Counsel warns of dire consequences "if [redacted] is forced to conduct a labor certification for [the petitioner's] position," but USCIS records show that [redacted] applied for a labor certification on the alien's behalf on June 30, 2008, more than a year before the petitioner filed the present appeal. The Department of Labor approved that labor certification, which then formed the basis of a new petition that [redacted] filed on March 25, 2009. USCIS approved that petition on May 27, 2009, two months before the petitioner filed the present appeal. Thus, the question of whether the petitioner could obtain a labor certification is not an open-ended or rhetorical one. Documented events have answered the question conclusively, by showing that he could and did obtain an approved labor certification and, as a result, an approved petition for the same classification that he first sought in the present proceeding. Counsel's assertion on appeal that "a labor certification should not be required in [the beneficiary's] case" is essentially moot, because the petitioner has already obtained one, along with an approved petition as a result. Counsel's claims about the effect of labor certification on the petitioner's career are not only baseless, but contradicted by established facts.

Counsel contends that the petitioner's "work has had a far-reaching impact on his field, as evidenced by independent support letters and the fact that he was recruited to his current position based on his national reputation in the field." The record contains no evidence that the petitioner "was recruited to his current position based on his national reputation in the field." The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

[redacted] stated that [redacted] recruited the petitioner after "conversations with prominent cognitive scientists," but she does not identify them. Therefore, the record does not show that these unidentified scientists were independent researchers who knew of the petitioner only by reputation, or the petitioner's own collaborators. (One of the initial witnesses, [redacted] collaborated with the petitioner before moving to [redacted]

The above is not the only instance in which counsel baselessly extrapolates from [redacted] letter. Counsel contends: "This letter also makes clear that if [redacted] is forced to conduct a labor certification for [the petitioner's] position, the company would either find no qualified applicants or would have to settle for a minimally qualified applicant." [redacted] did not mention labor certification at all, having written her letter more than a year after [redacted] actually filed an application for labor certification, which the Department of Labor expeditiously approved. Furthermore, counsel did not accurately describe the labor certification process. Counsel falsely implies that the labor certification process requires the hiring of the least qualified applicant. The labor certification process does not automatically or inevitably compel the employer "to settle for a minimally qualified applicant." If several qualified United States workers come to light, the employer remains free to choose the best-qualified of those applicants. Counsel also falsely implies the term "minimally

qualified" suggests incompetence. If an individual is incapable of performing the tasks of a given position, that individual is unqualified, not minimally qualified.

[redacted] also asserts that the petitioner's "work would be essential to the work of the [redacted] but the record demonstrates that the employer's stated need for the petitioner's services does not invariably prevent his departure from that employer. If anything, the petitioner has a stronger incentive to remain at [redacted] precisely because he did not receive a waiver; the approved petition is contingent on his continued employment there. In this light, granting the waiver would give the petitioner less, not more, of a reason to remain at [redacted]

Whatever the circumstances of how the petitioner came to be employed at [redacted], he did not work there at the time he filed the petition. His 2008 hiring at [redacted] cannot retroactively show that he qualified for a national interest waiver in 2007 when he filed the petition on his own behalf. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date based on a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Two of three additional witness letters submitted on appeal likewise rely on new facts stemming from the petitioner's recent employment at [redacted] and [redacted] both discuss a cooperative effort between [redacted] called the [redacted] project. The petitioner's involvement with this project began after the filing date. Therefore, his work on [redacted] shows that he continues working in the same general field, but cannot retroactively demonstrate that he already qualified for the waiver before he started that work. Indeed, if the petitioner had initially declared his intention to work on [redacted], that would have contradicted the original claim that it was in the national interest for him to stay at [redacted] to work on iSTART.

The remaining new witness, [redacted] attested to "the importance of [the petitioner's] work on the iSTART reading comprehension program. . . . It is at this point that [the petitioner's skills are critical. Because of his major role in developing the program, he is best suited to modify it." The record, however, contains no evidence that the petitioner is still working on iSTART. A revised version of the petitioner's own *curriculum vitae* indicates that the petitioner stopped working on that program in 2008, when he left [redacted]. The hypothetical assumption that iSTART's creators might eventually call upon the petitioner for assistance with upgrades or improvements is a very tenuous basis for a waiver claim.

Counsel, in the appellate brief, asserts that the director applied too stringent a standard of proof. Counsel cites *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), in which the AAO stated: "Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is 'more likely than not' or 'probably' true, the applicant or petitioner has satisfied the standard of proof." *Id.* at 376. Counsel claims that the director "incorrectly applied the higher 'clear and convincing evidence' standard to

this case" by requiring the petitioner "clearly" to establish eligibility for the waiver. Counsel contends: "If the Service applied the preponderance of evidence standard, as required, [the petitioner's] eligibility for a national interest waiver would have been obvious." This conclusion does not follow from the argument. The director's use of the word "clearly" does not somehow prove that the petitioner has met the burden of proof by a preponderance of the evidence.

Counsel also faults the director for not issuing a request for evidence. The director, however, was not required to issue such a notice. In instances where the initial evidence does not demonstrate eligibility, the regulation at 8 C.F.R. § 103.2(b)(8)(ii) states: "USCIS in its discretion may deny the application or petition . . . or request that the missing initial evidence be submitted." Counsel protests that the director "should have afforded [the petitioner] an opportunity to correct any perceived insufficiency prior to denying the case outright." The present appeal constitutes an opportunity to supplement the record, and the petitioner has availed himself of that opportunity by submitting several new exhibits. Those materials, however, do not establish eligibility as of the filing date. At best, they illustrate that the petitioner played a supporting role in the iSTART project.

Having claimed that "the impact of iSTART on the field is largely irrelevant to whether [the beneficiary's] work is important enough to qualify him for a national interest waiver," counsel claims that the petitioner's "work has had a far-reaching impact on his field." Counsel asserts that USCIS should not expect the sort of evidence normally expected from researchers because the petitioner "is not an educational researcher but instead develops the means to achieving the goals set by the psychologists and educators with whom he works." The petitioner's field, therefore, is software engineering. This being the case, the petitioner should demonstrate his impact on the field of software engineering. Nevertheless, counsel repeatedly returns to the theme of education research, and letters from education researchers, when discussing the claimed importance of the petitioner's work. Having argued that the petitioner should not be judged as a researcher, counsel offers no coherent alternative benchmark to gauge the impact of the petitioner's work as a software engineer.

Counsel notes that iSTART's creators have published several articles in which they acknowledged the petitioner's technical contributions (occasionally naming him as a co-author). This shows his participation in the projects, but does not inherently demonstrate significant impact on the field of software engineering.

Counsel states: "The denial incorrectly concludes that [the petitioner's] work has made no impact outside of his 'immediate circle of collaborators and colleagues.'" Counsel claims that the director failed to take into account "at least one support letter . . . from an independent source," specifically [redacted]. [redacted] however, stated: "I have kept in touch with [the petitioner] and consulted him on many technology and design issues" since meeting him in 2005. This assertion does not exactly make [redacted] a co-worker, but it refutes any claim that [redacted] specifically sought out the petitioner after learning of his reputation.

The record shows that, at the time of filing the petition, the petitioner was supporting researchers who strongly believed in the importance of the iSTART project. The petitioner did not objectively establish the importance of that project or his role in it. After basing his waiver claim almost entirely on the assertion that the iSTART project could barely survive his departure, the petitioner left the project, and his new employer filed a labor certification application and a new petition on his behalf. With the approval of both of those filings, the petitioner essentially seeks to waive a requirement that has already been met. The petitioner has not shown that the petition was approvable at the time of filing, and the subsequent changes in the petitioner's circumstances compound rather than mitigate the obstacles to approval of the waiver. The AAO will, therefore, affirm the director's decision and dismiss the appeal.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.